SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 54

UNITED STATES OF AMERICA,

Petitioner,

v.

R. B. RANDS, ET UX,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE RESPONDENTS

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BRIEF OF THE RESPONDENTS

OPINIONS BELOW

Respondents adopt petitioner's statement as to Opinions Below.

JURISDICTION

Respondents adopt petitioner's statement as to Jurisdiction.

QUESTIONS PRESENTED

1. Whether the constitutional requirement of "just compensation" relating to the highest and best use of condemned uplands may be diminished by the Federal Government's power to control navigation so as to require less than full compensation?

2. Whether the port-site value of lands next to navigable waters must be eliminated to comply with the rule of *Twin City* and *Vepco* that power-site value of lands be disregarded in condemnation?

3. Whether policy is found in Acts of Congress indicating that full compensation is to be paid for riparian proprietary rights.

STATUTES INVOLVED

In addition to the Statutes cited by petitioner, the following are applicable:

33 U.S.C. § 595 (1958):

> In all cases where private property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, where a part only of any such parcel, lot, or tract of land shall be taken, the jury or other tribunal awarding the just compensation or assessing the damages to the owner,

whether for the value of the part taken or for any injury to the part not taken, shall take into consideration by way of reducing the amount of compensation or damages any special and direct benefits to the remainder arising from the improvement, and shall render their award or verdict accordingly.

33 U.S.C. § 701-1 (b) (1958):

(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining or industrial purposes.

40 U.S.C. § 258(a) (1958):

In any proceeding in any court of the United States outside the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. . . .

43 U.S.C. § 1301 (a) & (e) (1958):

When used in this chapter—

(a) The term "lands beneath navigable waters" means—

(1) all lands within the boundaries of each of the respective States which are covered by non-tidal waters that were navigable under the laws of the United States at time such State became a member of the Union, or acquired sovereignty over such land and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

43 U.S.C. § 1311 (a), (d), (e) (1958):

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (a) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with the applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located and the respective grantees, lessees, or successors in interest thereof;
* * *

(d) Nothing in this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

(e) Nothing in this chapter shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters shall continue to be in accordance with the laws of such states.

43 U.S.C. § 1314 (a) (1958):

> (a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

STATEMENT

Petitioner's Statement is generally correct but requires amplification.

Respondents own lands on the Columbia River at the site of the historic Castle Rock landing. This land is and has been through past years bordered by deep water, sufficient to permit commercial navigation close to the shore. The location is upriver from the John Day Dam. It now forms a portion of the waterfront "Boardman Space Age Park," an industrial development project of the State of Oregon.

The State of Oregon began seeking lands for this project when it learned, about seven years ago, that a major aeronautical company might be induced to locate a testing operation in Eastern Oregon (R. 49). The State commenced a site search which culminated

in the negotiation of a lease and option to purchase the respondents' lands (R. 52). The option price was approximately $58,595.00 (computed from R. 52, 53).

The option (but not the lease) was relinquished when the state found it could acquire the land through the use of the federal power of eminent domain, in connection with construction of the John Day Dam. Meanwhile, Oregon had arranged with the Federal Government to exchange part of the Boardman bombing range, the bulk of the "Space Age Park," for state-owned lands elsewhere in the state.

Before Oregon acquired the tract desired for the development project, it had already made a lease to the Boeing Company (on July 2, 1963) including the property described in the Federal Government's quitclaim deed (R. 54). The relevant portions of the lease are set forth in Appendix A of this Brief. The lease payment is $60,000 per year. Oregon paid $17,500 for the property, according to the federal deed of September 25, 1963 (R. 54).

On August 13, 1963, the United States Government filed a Declaration of Taking in condemnation of certain lands situated along the Columbia River south shore in the State of Oregon (R. 25). Title was claimed under the provisions of 40 U.S.C. § 258a (1958), which provides that Declaration of Taking must declare that "lands are thereby taken for the use of the United States." The Government failed to use the statutory language.

The highest and best possible use of the lands taken from the respondents was as a port site. Generally, private port-site land is not readily available along the Columbia River and land otherwise suitable for ports is either owned by the Government or blocked from land access by Union Pacific Railroad on the Oregon shore and the Seattle-Portland-Spokane Railroad on the Washington shore. Respondents' lands, however, were accessible from land and suitable for use as a port, whether or not the John Day Dam was ever built (R. 47).

Respondents sought to establish the port-site value of the land as its highest and best use. But it was ruled by the District Court, in advance of trial, that the value of lands as a port-site was not a compensable interest because it was subject to the overriding navigational servitude in the United States (R. 35).

SUMMARY OF ARGUMENT

The government may exercise its control of commerce within the bed of a navigable stream without being liable for consequential damages to uplands. Also, uplands, when condemned, may not be valued as a power site, even though this is the highest and best use. But it does not follow that riparian lands are to be valued as if water did not exist. The water does exist and the right to use the uplands for port-site development is an integral part of the value of riparian lands. The statutory control exercised by the government over power sites as compared to port sites

illustrates the difference. Affirmative findings are necessary for a power development, and even then a license is granted subject to many conditions. A riparian owner may use his lands for a port site without restriction unless he is found to be obstructing navigation.

The port-site cases make a distinction between value as between private persons and value as between the Government and a private owner. This Court has held that as between the Government and the riparian owner, a port-site does have value. The value may be diminished as a consequence of a proper exercise of control under the Commerce Clause of the Constitution. However, the Government in this case is not diminishing the value as a consequence of its exercise of control under the Commerce Clause, but it is seizing the whole fee at its undiminished value.

The Government chooses to ignore the difference between frustrating the use of riparian land as a port-site and seizing the land in fee. It fails to distinguish between the *right* to control commerce and navigation, and the *ownership* of commerce and navigation. If the Government's position is correct that it *owns* commerce, what is to stop it from claiming all means of commerce without compensation? The constitution provides that congress shall have the power "to regulate commerce * * *" not own it.

Congressional policy lends further support for full compensation to the respondents as expressed in the water policy for Western States in the Submerged

Lands Act. Congress specifically excludes power site value and reserves navigation control. While granting all rights of development of lands to the states or their private grantees, the fair implication is that port-site value is not excluded, but confirmed in the private owner subject to the control of navigation by the Federal Government.

ARGUMENT

1. The Constitutional requirement of just compensation may not be diminished by the navigational control when the uplands are seized in fee.

Fifth Amendment just compensation for water-front property is the paramount issue in this case. The Government urges that two relatively recent decisions by this Court, *United States* v. *Virginia Elec. Power Co. (Vepco)*, 365 U.S. 624 (1960) and *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1956), bar full compensation here.

Justice Douglas has described the problem:

> Basically the problem in this case is to locate a workable and reasonable boundary between Congress' power to control navigation in the public interest and the rights of landowners adjacent to navigable streams and their tributaries to compensation for injuries flowing from the exercise of that power. The Constitution does not require compensation for all injuries inflicted by the exercise of Congress' power. Neither is the power unlimited. The line therefore must be drawn in accommodation of the two interests.

United States v. *Kansas City Life Ins. Co.*, 339 U.S. 799, 812, 813 (1950) (dissenting opinion).

The need to establish the line mentioned by Justice Douglas is explained in part by Chief Judge Hutcheson of the Fifth Circuit:

> This is a period of great governmental expansion, with enormously stepped up numbers of takings of private property for public use by expropriation, a streamlining of the procedures for taking, and, because familiarity breeds contempt, a consequent growing and, therefore alarming attitude of complacency, instead of viewing with alarm, with which government and public alike look upon the exertion of the power of eminent domain by which all that a man has can be taken from him by force. (footnote omitted.)

Slattery Co. v. *United States*, 231 F.2d 37, 41-42 (5th Cir. 1956).

The taking of respondents' lands was for navigational purposes. Therefore we start with the proposition that the Federal Government exercises almost absolute dominion over navigation through the Commerce Clause of the Constitution. But the extent of power claimed by the government in the present case is not generally available under the Commerce Clause.

> It is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power and narrower in scope, that frees the government from liability in these cases. When the government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone.

United States v. *Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950).

What is described as a "classic description" (Vepco, supra, at 628) of the scope of the power is found in *United States* v. *Chicago, M. St. P. & P. R. R.*, 312 U.S. 592, 596-97 (1941):

> The dominant power of the federal government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. (Citations omitted.) The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.

The dominion of the Federal government over navigable waters must be in furtherance of navigation. *International Paper Co.* v. *United States*, 282 U.S. 399 (1931). The leading case defining the rights of the government to take property in the bed of a stream without compensation affirmed the legal *title* to the bed of a stream in the riparian owner. *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913). Both *Twin City*, supra, and *Vepco*, supra, are decisions based upon the *Chandler-Dunbar* definition of the Government's control of navigation.

International Paper, supra, awarded compensation for the exact value for which *Chandler-Dunbar*

denied compensation; i.e., the value in the flow of the stream. The reason was International's rights to the water under New York law had been curtailed by the Federal Government in a taking under the war power as opposed to the navigation power. This Court commented, in denying the Government's argument that the water right was a mere revocable license, that the "Secretary of War did not attempt to pervert the powers given to him in the interest of naivgation and international duties to such an end." Id. at 407.

Proper government exercise of the navigational servitude within the bed of a stream may cause real economic loss to riparian owners. This is not, however, a taking within the meaning of the Fifth amendment because the damage is consequential. Riparian rights of uplands or fast lands may be diminished in a similar manner without compensation because there has been no taking. See, e.g., *United States* v. *Commodore Park*, 324 U.S. 386 (1945); *Greenleaf-Johnson Lumber Co.* v. *Garrison*, 237 U.S. 251 (1915); *Scranton* v. *Wheeler*, 179 U.S. 141 (1900); *Gibson* v. *United States*, 166 U.S. 269 (1897).

Each of these cases involved damage to uplands caused by a navigational improvement within the bed of the stream. In both *Scranton* and *Gibson*, the riparian property was made less valuable when the government constructed docks and wharves which blocked convenient access to navigable waters. The movement of the harbor line required the destruction of Greenleaf-Johnson Lumber Co.'s lawful dock without com-

pensation. Material dredged from the bay blocked a small navigable stream which fronted the claimant's property in the *Commodore Park* case. But in each of these cases there was no taking. The injuries were consequential, resulting from an exercise of the navigational servitude *within* navigable waters.

In *Chandler-Dunbar*, supra, the company owned power structures in the St. Mary's River. The structures were condemned. The Court denied compensation for the value of the flow of the river in which they were located, and for the value of the structures themselves. In allowing the taking and denying compensation, the Court relied principally upon the navigational servitude, but the original permits allowing the structures were expressly made revocable with or without cause by the Secretary of War.

Chandler-Dunbar was the leading case on the subject until *United States* v. *Twin City Power Co.*, supra. The power company had assembled much of the land needed to develop a hydro-electric facility on the Savannah River. Permission of the Secretary of War and licenses from the Federal Power Commission had been obtained but had been allowed to lapse. Reinstatement of the permits and licenses was not sought until after the United States had decided to build the project itself. Increased value of the upland as a power site was denied. This Court pointed out that the upland owner was seeking a value in the "flow of the stream," and this was not allowable under the *Chandler-Dunbar* decision.

The most recent opinion by this Court in this area is *United States* v. *Virginia Elec. & Power Co.* (Vepco, supra). A flowage easement over fast lands which Vepco had acquired to build a private dam was taken. The sole question was compensation; the easement was indisputably property. The Government (and a dissent by Justices Whittaker and Black and Chief Justice Warren, 365 U.S. at 638) urged that the only value taken was the private right to inundate the lands subject to easement, a value which the government had terminated. The majority found that the easement had "destructive value" in the rights which the easement gave Vepco as against the owner of the subservient fee. Id. at 630. The owner of the subservient fee had conveyed the fee to the Government for $1.00. The Court, obviously struck by the manifest injustice of the Government's position stated: "Compensation could be denied the fee owner because he had already conveyed the flowage easement (citation omitted), and denied the owner of the easement because it was valueless against condemnation by the United States. The Government would thus destroy the entire property interest in fast lands without compensation." Id. at 631.

The dissent answered this by stating: "the law requires us to say: Exactly so." Id. at 643.

Twin City strongly reaffirmed *Chandler-Dunbar* In *Chandler-Dunbar*, value for water power was denied; however, location value of lands adjacent to the St. Mary's River taken for lock and canal purposes

was granted. The *Twin City* dissent, 350 U.S. at 229 (four justices), cited particularly the lock and canal lands award in Chandler-Dunbar, concluding that the majority opinion "extend (s) the government's navigation servitude far above and beyond the high-water mark. * * *" 350 U.S. at 245.

A. Port-site value of lands next to navigable waters should not be eliminated to comply with the rule of Twin City and Vepco that power-site values are to be disregarded.

One writer analyzing the *Twin City* dissent concluded that the portion of *Chandler-Dunbar* dealing with value for lock and canal purposes was overruled by implication by the majority opinion. Fairman, *The Supreme Court*, 1955 Term, 70 Harv. L. Rev. 83, 131, 132 (1956). But Fairman failed to give effect to a footnote on canal and lock lands in the *Twin City* majority opinion. 350 U.S. at n. 1, 226: The *Twin City* footnote explained the lock and canal award:

> It may be that the Court was influenced by the fact that, on the special facts of the case, the use of the land for canals and locks was wholly consistent with the dominant navigation servitude of the United States and indeed aided navigation. Whatever may be said for that phase of the case, it affords no support for respondent, since waterpower value, held to be compensable by the Court of Appeals, was ruled to be non-compensable in the Chandler-Dunbar Case.

To distinguish the location value of lock and canal lands as in *Chandler-Dunbar*, from the use of lands for a port site which is similarly an aid to navigation,

is difficult, if not impossible. The definite exception for water power value, emphasized in the quoted footnote, is in accord with a statutory exception for water power value made in the Submerged Lands Act, 43 U.S.C. § 1301 (e) (1958), discussed in more detail below at page 28 of this brief.

Fairman had this comment on Twin City:

> The government's argument in these cases is plausible on its surface. The United States can deprive the land of its power site value without compensation by diverting the waters or refusing to permit the building of a dam. A subsequent condemnation would require payment only for the diminished value. It is then contended that the result should not be different if the condemnation is contemporaneous with the termination of the private opportunity. This argument disregards the traditional concept of a "taking" within the meaning of the Fifth amendment. The destruction of the value in the first instance is not compensable because it is not such a taking; when the taking is later accomplished by condemnation, the value has already been reduced. But when both destruction of value and condemnation occur at the same time, the worth of the property is not diminished prior to the taking, and just compensation would seem to include the undiminished value.

70 Harv. L. Rev. at 132.

Some inconsistency between *Twin City* and *Vepco* has been suggested. Bickel, *The Supreme Court*, 1960 Term, 75 Harv. L. Rev. 41, 125 (1961). Contra, Note,

Compensable Value "Taking" of Dam Site, 14 Stan. L. Rev. 800, 804-06 (1962) (decisions reconciled with Holfeldian analysis of correlative rights and duties of owners of easement and fee).

However, it is not necessary to question in the slightest degree the holdings in either *Twin City* or *Vepco* to see factual and legal distinctions between the private dam development there thwarted and the private port lands here taken.

First, the character of the use is physically different. Value inherent in a dam site, as observed by Justice Douglas, is in the flow of waters. Power in the flow, the rate, and quantity of water is essential for dam site value. Port site value is not tied to the fact of water moving with power past the lands taken. Water is necessary; indeed, water which is burdened with the navigation servitude is necessary for there to be port site value. But the existence of water is sufficient—it need not have power which is needed for a dam site.

Twin City and *Vepco* involved lands which *could* be used for dams if all the land were assembled, if a federal license were granted, and if many contingencies were satisfied. (Note should be made that at least some of the earlier cases, between *Chandler-Dunbar* and *Twin City*, denied compensation with language that talked of conjectural value because of the improbability that the use would be realized. See, e.g., *United States ex rel, TVA* v. *Powelson*, 319 U.S. 266 (1943); *Olson* v. *United States*, 292 U.S. 246 (1934).)

But the lands in the instant case had present utility as a port site at the time of taking. They had been used as a port site in the past, known as the old Castle Rock Landing. Barge shipping was unloaded in the past on Respondents' lands, and the State of Oregon had secured an option upon their lands for a port site.

Federal power over dam site development is not the same as its power over port site development. Under the Federal Power Act, 16 U.S.C. § 791-a-825r (1958), licenses are granted for a limited term, under specific conditions, with controlled rates, with preferences to states and municipalities, and may be denied altogether if the Federal Power Commission finds that the United States itself should construct the facility for which the private applicant has sought a license. See 16 U.S.C. § 799, 803, 812-13, 800 (a), 800 (b) (1958). The general tenor of the Act is to provide the rules for disposition and use of natural resources which the United States manages in an at least quasi-proprietary capacity. The Supreme Court has said that the judgment of the Federal Power Commission can be upset only when that judgment has no basis in evidence and is devoid of reason. *United States ex rel. Chapman* v. *FPC*, 345 U.S. 153 (1953).

Federal control over private port site development is different. The object of Federal control is to prevent obstructions to navigation. See 33 U.S.C. § 403 (1958). When harbor lines have been established by the Secretary of Army under 33 U.S.C. § 404 (1958), § 403 permits a private person to build

wharves, docks, and landings behind the harbor line. Only when there has been no harbor line established does § 403 require advance application to the Secretary of Army for permission to build port site facilities. Port site use by a property owner is a right subject only to the interests of navigation, accomplished by § 403. *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411 (1926).

In *River Rouge*, this Court set the criteria for reducing the condemnation award for navigation improvement by the increase in value to the remaining property resulting from the improvement. Because the trial court described the Government's control of navigation as being "absolute" and the government had "the right to deprive any riparian owner of all access to the navigable portion of the stream and order the removal of any docks or structures placed in the stream * * *," this Court held the trial court erred. Id. P. 417. This Court further stated that a riparian owner "has, in addition to the rights common to the public, a property right incident to his ownership of the bank, of access from the front of his land to the navigable part of the stream, and when not forbidden by public law may construct landings, wharves or piers for this purpose." 269 U.S. at 418.

Thus the government does not have the same power to restrict port site development that it has to limit the building of dams. To state it in terms of Congressional intent, the statutes prohibit private dam development for a number of different reasons, includ-

ing a finding that the Government itself should develop the dam. Port site development is barred only when it would constitute an obstruction to navigation.

This Court has compared the power of the government over navigation to the power of State government over the use of highways. "The beneficial use and hence the value of abutting property is decreased when a public street or canal is closed or obstructed by public authority * * * but in such cases no private right is infringed." *Reichelderfer* v. *Quinn*, 287 U.S. 315, 319 (1932). The raising of the level of water, reducing the power head at a private dam, was compared to the raising of a highway past a claimant's land—both noncompensable events. *United States* v. *Willow River Power Co.*, 324 U.S. 499, 510-11 (1945).

The application of a similar analogy here requires recovery for port site value. The Government could block access to the land or water highway, or could raise the level of the river without compensation (other than for physical encroachment on the private lands). The taking of the property next to the river without diminishing the value of the property requires compensation for the property according to its value as located next to the river. Certainly, the fact that the river could be closed does not make the land worth only as much as land far from the river. Rather the diminution in value if the river were closed is discounted by the improbability of its happening. This approach is similar to the formula for valuing the

easement held by *Vepco*, although the probability used there was that of the exercise of the easement by the utility. 365 U.S. at 634-36.

There obviously is a point beyond which the Government may not use the navigational servitude to bar just compensation. The Federal Government might seek to value irrigated land as desert land because the water could be cut off in the exercise of the navigation servitude. See Fairman, *The Supreme Court*, 1955 Term, supra, at p. 132.

The example seems absurd. It is absurd because such arbitrary action causing the diminution in value is highly improbable, and would be attended by sanctions, both judicial and political. Fairman, supra. The Government recognized this in its requested charge to the jury in *River Rouge*, supra. The Government said the navigation power cannot be "arbitrarily and capriciously exercised." Id. 418.

This Court has interrelated the question of arbitrary action with property valuation in *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 283-84 (1943). The question there presented was valuation of lands acquired for a private dam development, where all the necessary lands had not been acquired. Powelson sought to set up the power of eminent domain held by him to show acquisition of the needed lands was possible. The Court held the power to be a revocable privilege, for which the granting state need not pay if it revoked the license—and therefore the Federal Government need not pay. The Court said:

> A state may of course destroy or diminish values by an assertion of its police power without the necessity of making compensation for the loss. (Citations omitted.) While such a change will not be presumed (United States v. River Rouge Improvement Co., 269 U.S. 411 (1925), the possibility or probability of such action, so far as it affects present values, is a proper subject for consideration in valuing property for purposes of a condemnation award. (Citations omitted.) We do not disturb these general principles. The United States no more than a state can be excused from paying just compensation measured by the value of the property at the time of the taking merely because it could destroy that value by appropriate legislation or regulation.

319 U.S. at 283-84.

The land in the instant case should be valued according to its highest and best use as a port site, taking into consideration the possibility that legitimate government action will prevent port site development. Such a possibility is extremely unlikely. The Government disposed of the property by deed expressly requiring a port to be developed on the tract which includes the lands here in question. The State of Oregon's lease to the Boeing Company of the tract expressly gives the Boeing Company full riparian rights subject to various easements. The possibility of destruction of port site value would thus appear to be virtually nil in the present case.

A persuasive additional reason for allowing port

site value for the lands here in question comes from the general requirement that where part of a private parcel of land is condemned for any river or harbor improvement, the award shall be reduced to the extent of the benefit to the remaining portion from the improvement. See 33 U.S.C. § 595 (1958). It was a provision to this effect which was at the heart of the *River Rouge Improvement Co.* case, supra. In that case the position of the private party and the Government, were the converse of our situation. Land had been taken and there were benefits to the remaining land for improved utilization as a harbor. The Government urged that the benefits to the remaining land for port purposes were not speculative or uncertain, even in view of the navigational servitude.

In *River Rouge*, the Court recognized and cited *Chandler-Dunbar*. In navigational servitude cases, the Court has on occasion distinguished value in land as between private parties and value as between the government and a private owner. See, e.g., *Grand River Dam Auth.* v. *Grand-Hydro*, 335 U.S. 359, 373 (1948); *United States* v. *Willow River Power Co.*, 324 U.S. 499, 511 (1945). But in *River Rouge*, a case involving value between the government and a private owner, the private land was held to have additional value because of its suitability for port development.

It is not only the language of the *River Rouge* opinion which supports respondents' position, but also

the injustice of a contrary holding. It would be a strange result which would allow the Government on one side to take what the landowner would otherwise get by virtue of an improved value, and at the same time deny this identical value, for port purposes, when it takes the land itself. This heads I win, tails you lose approach by the Government does not square with the Fifth Amendment requirement of just compensation.

The New York courts have considered the problem since *Twin City* (and, on appeal, since *Vepco*) and found that while water flow value is to be excluded on condemnation, value by way of location next to water must be paid. *Andrews* v. *State*, 19 Misc. 2d 217, 188 N.Y.S.2d 854 (Ct. Cl. 1959), aff'd, 11 App. Div. 2d 599, 200 N.Y.S.2d 451 (1960), aff'd, 9 N.Y.2d 606, 176 N.E.2d 42, 217 N.Y.S.2d 9, cert. deied, 368 U.S. 929 (1961). The Court said:

> It follows therefore that consideration must be given to the location of this land and its contiguity to the river in arriving at its fair market value. We cannot regard the decisions in United States v. Twin City Power Co. (Citation omitted) and United States v. Chandler-Dunbar Water Power Co. (Citation omitted) as requiring a different result. The effect of these cases is to hold that where property is condemned for use as an integral part of the flow of the stream, condemnee is not entitled to the value of the property when so used, since it is entirely within the power of the Federal government to determine all factors governing the flow of the stream.

> Thus, one part of the decision in United States v. Chandler-Dunbar Water Power Co. dealing with the island owned by St. Mary's Power Co., rejected any value arising from location as a necessary part of a comprehensive system of river improvement. On the other hand, in the same decision, the Court approved the finding of additional value in the strip of land owned by Chandler-Dunbar Water Power Co. arising from its availability and suitability for lock and canal purposes. It seems quite clear that the canal and lock use can only be carried out in an exercise of the sovereign's control over commerce and navigation, and yet the paramount right of the sovereign over the flow of the stream for these purposes would not permit the appropriation of that property without compensation for that aspect of its value.
>
> 19 Misc. 2d at 222, 118 N.Y.S.2d at 860.

Admittedly this was state condemnation, but Federal principles were involved. The only dilution of the quoted analysis is in the suggestion which followed that a contrary interpretation might not be in accord with New York law.

It should be re-emphasized at this point that the suitability of respondents' lands for a port site is historically established. This is the site of the old Castle Rock landing. And the lands were well suited for a port site before the John Day Dam was ever conceived. Further, since the entire parcel of appellant's lands was taken, there is no question of improvement to a privately held residue. This point only simplifies the case, and does not detract from the applicability

of *River Rouge*, nor diminish the injustice of the government's position.

As this Court said in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 337-38 (1893):

> (A)fter taking this property, the government will have the right to exact the same toll the navigation company has been receiving. It would seem strange that, if by asserting its right to take the property, the Government could strip it largely of its value, destroying all that value which comes from the receipt of tolls, and having taken the property at this reduced valuation, immediately possess and enjoy all the profits from the collection of the same tolls. In other words, by the contention this element of value exists before and after the taking, and disappears only during the very moment and process of taking. Surely, reasoning which leads to such a result must have some vice, at least the vice of injustice.

B. Policy is found in Acts of Congress which indicates that full compensation is to be paid for riparian proprietary rights.

There is reason in the present case to find Congresssional intent to allow full compensation, just as there was in *United States* v. *Gerlach Livestock Co.*, 339 U.S. 725 (1950). There were two bases for the Court's decision there: The exercise of Congressional power did not seem to have been premised on an intent to aid navigation. Also, intent was found to proceed under the Reclamation Act which had provided compensation for interests taken or disturbed

without regard to whether the navigational servitude could be exercised to defeat compensation.

While there is no doubt that the purposes of the John Day Dam include aid to navigation, Congress has chosen to exert less than its full power in aid of navigation in projects in the western states, including Oregon. In its Declaration of Policy, 33 U.S.C. § 701-1 (b) (1959), the navigation power is stated to be limited in favor of uses of navigable waters for several other purposes, including industrial use. The reason behind this policy is doubtless the arid condition of much of the area to which it applies, west of the 98th meridian. The provision shows that at least in this regard, Congress has limited the use of the navigation servitude in the western states.

This difference in policy in the West is reinforced by part of the Submerged Lands Act, 43 U.S.C. § 1311 (e) (1958):

> (e) Nothing in this chapter shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface water; and the control, appropriation, use and distribution of such waters shall continue to be in accordance with the laws of such States.

The Submerged Lands Act is also directly applicable to the navigable portion of the Columbia River which is involved in the present case. 43 U.S.C. § 1301 (a) (1958); the general declaration of ownership in

sub-section 1311 (a) independently lends weight to the respondents' claim of port site value:

> (a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage; administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

Congress has in mind the navigation power when the Submerged Lands Act as written; sub-section (a) is qualified by an exception for navigation in subsection (d):

> (d) Nothing in this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

This exception is re-stated in the positive in § 1314 (a), but this sub-section also contains additional reasons for full compensation in the present case:

> (a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, *but shall not be deemed to include, proprietary rights of ownership*, or the rights of management, administration, leasing, *use and development of the lands* and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective states and others by section 1311 of this title. (Emphasis supplied.)

The purpose of the Act, as is well known, was to allow the States to make leases for mineral (primarily oil) exploration on the continental shelf under the sea. It is to this end in particular that § 1311 (a), above quoted, confirmed title not only in the lands, but in the natural resources. And section 1301 (e) defines:

> (e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life *but does not include water power, or the use of water for the production of power;* (emphasis supplied.)

The government states in its Brief that the relevance of the Submerged Lands Act, 43 U.S.C. 1301-1343 is not immediately apparent. It correctly states the intention of the Act to confirm the long recognized title of the States and their grantees to the lands beneath such waters. But the government fails to consider the clear legislative history of the Act and its intended impact upon port proprietary interests.

The legislative history of the Act is discussed at length in *United States* v. *Louisiana*, 363 U.S. 1, 4 L. ed. 2d 1025, 80 S. Ct. 961 (1960), at pages 1038-1040. See footnotes 16 through 18. However, the precise point involved in this case was not then before the Court in *United States* v. *Louisiana*, supra, and, therefore, the Court did not have occasion to explore the legislative history on port proprietary interests in detail.

Senator Holland, the sponsor of S. J. 13, stated (99 Cong. Rec. 2750)*:

> * * * Taking the nation as a whole, there are undoubtedly several billion dollars worth of port facilities alone, located on inland waters, on built-up lands which were once inland waters, so that it is easy to understand why the attorneys general, municipal officers, port authorities and other similar officials, are deeply concerned in

* The debates on this phase of the Submerged Lands Act will be found in 99 Cong. Rec. at pages 2751, 2764, 2765, 2772, 2773, 2816, 2817, 2818, 2819, 2836, 2837, 2843, 2930, 2931, 3004, 3328, 3329, 3334 and 3335. There are, of course, other scattered references in the Congressional Record bearing on this subject but the foregoing are among the most important.

this fight and are insistent that the Congress shall effectually release to the State and their grantees all property rights in the inland waters and their beds, saving only to the Federal government those rights which will enable it to perform its constitutional functions. * * *

Senate Report No. 133, 83rd Congress, 1st Session (Majority Report on Senate Joint Resolution 13) graphically pointed up the concern of the Congress in distinguishing between proprietary interests in port sites vis-a-vis the government's right of control—dominium versus imperium. It stated, in part (p. 6):

> * * * The control by the States of the production of oil and gas from their coastal belts has also created substantial values, which will continue temporarily in a few places for a few years, but such production of oil and gas in the past, present, or future is insignificant in value when compared with the many permanent values which largely determine the development and prosperity of coastal communities and many important industries.
>
> Considering the untold millions of dollars of economic wealth represented in the port and harbor developments of our great coastal cities, in the recreational, residential, and commercial areas of Boston Harbor, Long Island, Staten Island, New Jersey, Florida, California, and elsewhere, and the beginnings of the development of the undersea oil and gas deposits within State boundaries off the Gulf and Pacific coasts, the committee majority is firmly convinced that the State ownership under which all of these and many other development have achieved should

be continued in the public interest and in the furtherance of our Federal-State system.

The Report continues by pointing out that lands under inland waters comprise some 28,960,640 acres. Appendix G to the Report, (Memorandum Brief of the National Association of Attorneys General), states the purpose succinctly at page 81:

> The States admit that the Federal Government has paramount powers over navigable waters to improve and keep them open for public use, and that the Government has paramount constitutional powers of government over these lands for national defense, commerce and international affairs. They ask merely that governmental powers be maintained separate and distinct from proprietorship, and that no exercise of governmental powers be allowed to acquire without compensation resources that have heretofore been considered *as part of and attached to ownership of the soil.* (Emphasis supplied.)

What the National Association of Attorneys General is attempting to do is to make a clear distinction between a Federal government proprietary right and its admitted power of control—again, the distinction between dominion and imperium. No one contends that the Federal Government would have been required to pay compensation to the respondents had it elected to build a dike or jetty in front of their port site properties on the Columbia River. *Scranton* v. *Wheeler*, supra; *Gibson* v. *United States*, supra. No compensation would have been payable if the navi-

gable waters in front of their port-site had been filled in with material dredged from other navigable waters. *United States* v. *Commodore Park*, supra. The Federal Government could have established a harbor line behind the high water mark of respondents' property without paying compensation. *Greenleaf-Johnson Lumber Co.* v. *Garrison*, supra. But the Federal Government elected to do none of these, and instead proceeded under the principles of eminent domain.

The State of Oregon considers riparian rights valuable property rights, including particularly the right to build a pier out to the line of navigability and the right of access to the navigable part of the stream from the front of the land. 3 Will. L. J. 63 (1963). ORS Chapter 780.

We are unable to distinguish this case, involving the applicability of the Submerged Lands Act and the doctrine of riparian rights developed in the State of Oregon from the situation in *Federal Power Commission* v. *Niagara Mohawk Power Corporation*, 347 U.S. 239, 74 S. Ct. 487, 98 L. ed. 666 (1953). In the latter case, this Court held that the Federal Water Power Act, by making express reference to preexisting water rights [as does the Submerged Lands Act], thereby implies that such rights are to survive unaffected by the Act, at least until taken over by purchase or otherwise. This Court also held, in that context, that riparian water rights, like other real propery rights, are determined by state law; title to them is acquired in conformity with that law.

We recognize that at this point in our analysis of the effect of the Submerged Lands Act that the essential question of the degree to which the navigational servitude affects compensation must involve the same test of constitutional navigation power with which we dealt earlier in this brief. But the quoted portions of the Submerged Lands Act add force to respondents' claim of property right in the riparian owner to develop his lands for the economically and socially useful value as a port. This is a right which can be limited only when the attempted exercise of it tends to obstruct navigation (as for example a dock which extends past the harbor line) or when the power over navigation is otherwise properly exercised in a fashion which consequentially limits use of the property, and subject to the limitation that the owner does not have the right to develop a hydroelectric power project.

In the present case there was no such limit on the riparian owner's rights in his lands. It is conceded that the Government could have made respondents' lands less valuable without becoming constitutionally liable for compensation, but it is established that no such action was ever taken. Rather, we have an admitted taking of the lands and of the proprietary right to use the lands for a port. The lands were taken and, in fact, were then incorporated in a larger tract which was transferred to the State of Oregon for use as a port . . . a tract which Oregon had already leased, in anticipation of acquisition, to a private corporation.

> The question presented is not whether the United States had the power to condemn and appropriate this property . . . for that is conceded, but how much it must pay as compensation therefore. Obviously, this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance; for in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government. The first ten amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many, that without some such declaration of rights the government would assume, and might be held to possess, the power to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights.
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> * * * * * *
>
> It in no way detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

Monongahela Navigation Co. v. *United States*, 148 U.S. 312, 324-25 (1893).

CONCLUSION

The respondents should be allowed to show, in accordance with the general law, the highest and best use of their lands; i.e., a port-site. This use, not speculative since the lands had been used as a port site in the past, is subject to the navigation servitude to the extent that the Government properly acts within the bed of the stream in aid of navigation. But here nothing was done by the Government to diminish the value of this land. Rather, the land was taken for use as a port site, and port site value should be allowed the owners. This Court has held that as between the Government and a private owner, the riparian right to develop a port is a valuable property right. For this, Constitutional just compensation must be paid. This conclusion is reinforced by the grant in the Submerged Lands Act of the right to develop all natural resources, excepting only power-site development, and subject only to the navigation servitude. Here there was a taking of the lands at their full value. Full compensation should be allowed.

The Court of Appeals should be affirmed and the case remanded to the District Court for a new trial on the issue of just compensation, allowing evidence of port-site value.

Respectfully submitted,

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